

1414986 (Refugee) [2016] AATA 4154 (18 July 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division
CASE NUMBER: 1414986
COUNTRY OF REFERENCE: China
MEMBER: Rachel Westaway
DATE: 18 July 2016
PLACE OF DECISION: Melbourne
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 18 July 2016 at 4:05pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of China, applied for the visa [in] May 2013 and the delegate refused to grant the visa [in] August 2014.
3. The applicant appeared before the Tribunal on 6 November 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

RELEVANT LAW

4. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.

Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the Regulations to a particular person.
8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
9. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). Examples of 'serious harm' are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of

nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

10. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
11. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
12. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
13. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
14. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Complementary protection criterion

15. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
16. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

17. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

18. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

Country of reference

19. The Applicant claims to be a Chinese national. Based on the Department's findings that his national identity card is genuine, the Tribunal accepts this and finds that China is his country of nationality and his receiving country for the purposes of s.5(1) and s.36(2)(aa) of the Act.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The issue in this case is the credibility of the applicant's claims and whether the applicant is as claimed a practicing Christian who on return to China has such a profile that he would face serious or significant harm. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
21. The applicant came to Australia [in] September 2009 on a subclass 976 electronic travel visa. He remained in Australia and became unlawful [in] December 2009 until [May] 2013 when he applied for his protection visa, the subject of this review. He was then granted a Bridging visa C.
22. The applicant made the following claims in his application:
- He entered Australia on a fake passport from China under the name of [Alias 1].
 - He claims to have been persecuted by the Chinese government for attending an unregistered church in China and was forced to flee the country.
 - He claims he is married to [Applicant's wife] and she is a Christian. He also claims to have a son. He stated that his wife encouraged him to attend church. He fears the churches will be eradicated by the Chinese Communist Party.
 - He claims that his wife is resolute in her faith and the practice of it in an unregistered church in spite of the dangers he claims she faces. The applicant claims he then became involved too.
 - He claims on Sunday [a date in] May 2009 at 10am a Christian gathering was held at his home in China with approximately 10 people. He stated gatherings alternate between homes. The police raided their home and ransacked their house. He and his wife were angry, he confronted the police. The argument escalated and so he took sole

responsibility for the religious material and gathering. Other attendees were not arrested however the police took him away to [a named] police station.

- He claims he was interrogated and detained for 15 days. He claims he refused to eat and demanded release. He claims following his release he believed he was monitored and his human rights were suppressed. He claims to have been ordered to go to the police station every Sunday for re-education and brainwashing and he was forbidden to attend church services again. He used an agency to assist him in leaving China and they suggested he obtain a fake passport as his profile with the police will not permit him to leave the country.
 - He claims in December 2012, there was a large scale action by the government arresting members of unregistered churches however his wife was not arrested. In February 2013 he learnt that his wife was caught and detained for 7 days. He claims that she pleaded with police to allow her to go because her son was very young and needed care. She was released and called her husband to say not to return because everyone who attended the unregistered churches were having a miserable life.
23. The application was refused with the delegate noting some specific issues. It was claimed that the applicant engaged in sustained deception regarding his identity. He was vague and provided evasive responses which did not suggest he had any first-hand experience pertaining to his claims. The delegate stated that his claims about becoming a Christian lacked substance. The delegate referred to country information which did not support the detail in the applicant's claims.
 24. The applicant provided the Tribunal with a copy of the delegate's decision.
 25. The applicant appeared at the Administrative Appeals Tribunal to provide evidence. He confirmed that he received assistance to fill in his protection visa application and that he had hired an agent to do it. He claims that he roughly knows what was included in the form.
 26. The applicant stated he was born on [date]. He is [age] years old at the time of the hearing.
 27. He was born in Fujian China. In 1999 he was [age]. He went to work in another province and moved away from his family. His employment was with a [product] company and he fixed [these products].
 28. He met his wife in Fujian, he then returned to his city for the wedding. It was not an arranged marriage.
 29. The applicant stated his family is made up of his parents and [a sibling]. The applicant is married and he has one child. His son was born in [year]. He is [age] years old.
 30. The applicant's wife and child live in Fujian with the wife's mother. This is [distance] from his parents' home. The applicant has not returned to China to visit them. He confirmed that his family have not visited him in Australia and nor does he have relatives here.
 31. The applicant confirmed that his studies were up to [specified year at] school.
 32. Since he has been in Australia the applicant has been engaged in employment assisting in [labouring jobs]. The applicant confirmed that he sends money back to his family.
 33. He said that his wife wants to come to Australia because she likes the lifestyle here.
 34. When asked why he left China, he stated that he was a Christian and was persecuted.

35. The applicant claims to be a member of the local family church. He has been a member for 10 years. He said that he originally went with his family but now he goes by himself. He claims that he was arrested in China because this type of family gathering is illegal in China.
36. The Tribunal noted that the applicant was reading from a piece of paper and asked the applicant why he was doing this. He said that he wasn't in a good mood recently. The applicant claims his wife filed for divorce two weeks ago in China.
37. He liked to come to Australia because Australia has freedom of religious beliefs and you can have your own gathering.
38. The applicant stated his wife did not come because his child was very young. He stated they didn't have enough money.
39. The Tribunal asked the applicant why he chose the local family church to attend. He stated that he was simply following his wife and where she went and was a member.
40. The Tribunal asked the applicant what happened when he attended the church gatherings. He stated that they had discussions about political topics. He said he does not think the church is legal.
41. The applicant stated that he became a member of the church because of his wife but he said he liked the feeling that he could speak freely. When the Tribunal asked him what he liked speaking freely about, he said "something illegal".
42. He said he could discuss killing people or setting up a fire for example. The Tribunal asked the applicant what his wife would say in church if she too spoke freely. He said that she has her own opinion and she likes the process.
43. The applicant then said that he thought he was a Christian but he claims it doesn't feel quite right. The applicant stated he hasn't been to a real church but did attend a family gathering.
44. He claims to be baptised in Australia. The Tribunal asked him what this means to him and he stated he isn't a real Christian unless baptised and it means to purify yourself and obtain a new version of himself. The applicant claims he believes in Jesus. When asked if he knew the name of Jesus' mother, the applicant stated that he did not.
45. The applicant stated that he is a Christian and it means that the joy he gets and the process makes him feel comfortable. When asked how regularly he would attend church, he stated every week to two weeks in Australia. He attended the Church in [Suburb 1] and [Suburb 2]. However, he said that he doesn't attend any more. When asked why, he stated that it is for different reasons; he has depression and family reasons. The Tribunal asked the applicant if he has been diagnosed by a doctor and seeking assistance. The applicant stated that he has not sought assistance from a doctor.
46. The Tribunal asked the applicant why these reasons would stop him attending church. He then said that it doesn't. The applicant said that he has not seen his family or parents for a long time. He said he has nothing to say and there are no topics for conversation so he cannot attend church. He said he feels very empty in his mind.
47. The applicant stated that he attended one year ago and has not been attending since. The applicant stated that his wife wants a divorce.
48. The applicant stated that his parents don't know these details. The Tribunal asked the applicant if he is thinking about returning to China. He said that perhaps he should return to

China. He said he is contemplating this. He wants to stay in Australia and they can come and join him. They would be very happy here. He stated that he is afraid of returning to China but he stated that if he doesn't return, he is worried about his child. He doesn't want his family to grow apart.

49. The applicant stated that he thinks his wife is still attending the local church but he isn't sure as they have been separated for a long time. The Tribunal asked him to clarify and he stated that he thinks both. He claims they have been separated for more than one year.
50. The applicant speaks to his son every one to two months but his son doesn't really speak to him. He claims he is distant. He sends money but not much and not regularly, approximately \$4,000 to \$5,000 per year.
51. The applicant stated that he feels his life went into disarray 2 weeks ago when she filed for divorce. He feels he can't make sense and stated he apologised for wearing slippers. He knows the opportunity is precious but he doesn't know what to think. He has a funny feeling he cannot explain.
52. The Tribunal asked the applicant to explain how he practiced his Christianity in China. He stated that they take turns to go to peoples place and when worshippers went to his house, it was raided by the police.
53. The Tribunal put to the applicant independent country information and outlined the recent DFAT country report which states that the local church and its members are generally tolerated in Fujian. Those targeted by police are normally the main organisers.
54. The Tribunal asked why the applicant would have a profile if he returned to China. He stated that because of the incident that occurred in his house, he believes he will be targeted. The applicant claimed he was arrested and detained in a detention centre. The applicant claims he refused to eat but it did not help and he was detained for 15 days.
55. He claims they called him names and kicked him. He stated that he was detained because he attended the local church. He said they referred to re-education but he didn't listen. He said that during his time in detention there were lots of words being said by the guards and there were ten people in one room who were arrested. He said that there were many others also arrested but none from his church and that they said they were there for other reasons.
56. The Tribunal asked the applicant why he left China on a fraudulent travel document. He claims he couldn't leave on his own travel documents. He claims he was too old to be a student and he is not educated so he left on fraudulent documents.
57. The Tribunal put to the applicant country information which details that the applicant could face a fine and a short period of time in detention based on using fraudulent documents should he return to China. The applicant stated that he doesn't want to use this as an excuse to stay in Australia because he did leave with a fraudulent identity and he understands that this is illegal.
58. Asked if he was to return to China will he still attend the local church. The applicant stated that he does not know. He said that it depends on how things develop with his wife and child. He confirmed that his son does not attend the local church.
59. The applicant then said he finds it difficult to be clear.
60. The applicant claims that his wife was arrested in regards to her involvement in the local church is 2013. She was detained for 7 days. She went to the same detention centre as him.

It was based in Fujian too. He said that she said she was a similar situation. The police came and 4-5 people were arrested. She was released after the standard punishment of 7 days detention. He clarified that the place in which she was arrested was a different place to his arrest. She was arrested in her home where she lives with her parents. The first arrest in which he was involved was at his home owned by his parents.

61. The applicant claims he was detained for 15 days and the Tribunal asked him why his detention was longer than his wife's. He stated his detention was longer because he was aggressive.
62. The applicant's parents and in-laws have never been arrested. He claims that his in-laws go to the formal church and the applicant's parents go to the registered church too but not as often.
63. The Tribunal put its concerns to the applicant to allow him an opportunity to provide further information. The Tribunal stated that it had concerns regarding the applicant's credibility given he had sought out and successfully attempted to use fraudulent travel documents to come to Australia, he has limited knowledge of the Local Church. He stated that he believes that he can say anything because it is not regulated by the government, for example, he stated that when he went to the local family church he could talk about killing people. The applicant responded by saying that "this is just a saying". He claims that he made a mistake by using fake ID but he didn't have a choice back then.
64. The Tribunal asked the applicant how, given his wife has also been detained; that she has managed to remain remains safe in China yet he is claiming protection. He stated that she keeps a low profile, however he was punished longer and that he would be under government surveillance. The applicant stated that he does not believe his wife is safe and he said that she is thinking about leaving China too but because he left China illegally she cannot leave.
65. The applicant stated that maybe she wants a divorce so she can marry someone else and go away.
66. The Tribunal asked the applicant if there was anything further he wished to add and stated no.

COUNTRY INFORMATION

67. The following information provides a background on the 'local church', also known as the Shouters.
68. Local Church membership is officially banned in China and considered an "evil cult". DFAT's March 2015 report states that believers in unregistered Protestant Christian organisations, number approximate 70 to 100 million and that home churches can be found across China. Gatherings of 30 to 40 people are generally tolerated, although DFAT are aware of cases where gathering of fewer peoples have attracted negative attention by the authorities. Whilst DFAT assess that members of unregistered church movements could be monitored by authorities, they do not refer to any such incidents occurring to members of the Local Church or other unregistered groups in Fujian province.
69. There are a significant percentage of Christians in Fujian province, estimated between 10 and 15% of the overall population.

70. The authorities in Fujian were considered to be one of the more liberal minded groups within China, and that unofficial church groups were permitted to practice as long as they did not cause significant issues for the authorities.
71. DFAT's March 2015 report states that the State Administration for Religious Affairs (SARA) permits friends and family to hold small, informal prayer meetings without official registration. It confirms however that there are some house churches which do attract the negative attention of authorities and others that may have members in the thousands which do not.

FINDINGS AND REASONS

72. The Tribunal has considered the Applicant's claim that for ten years in China he was an adherent of the Local Family church after his wife encouraged him to attend and that he attended gatherings of the church in his village at both his own home and at other people's homes. On the evidence provided at hearing, the applicant displayed a limited knowledge of Christianity, the Local Family Church and the difference between registered and unregistered churches in China. For example, when asked what they talk about at church, the applicant responded political topics and illegal things. When asked to clarify, he stated he can speak about killing people or lighting fires. When asked why he prefers to attend the unregistered church, he stated he can speak about whatever he wants. The Tribunal provided the applicant with an opportunity to explain what he meant by these things given that they detract from the credibility of his claims as they do not represent what would be spoken about in church and do not demonstrate an understanding of Christianity. The applicant stated that they are just examples of what is said and what he can speak about. The applicant was able to answer some basic questions about baptism but provided no further clarity or detail to demonstrate his understanding and commitment to Christianity. The Tribunal does not accept that the applicant has an understanding of Christianity or a commitment to Christian beliefs. Given the applicant claims to have been a member of the Local family church for ten years prior to coming to Australia, the Tribunal would expect the applicant to be able to provide relevant and detailed information about his understanding of the Local church which he attended.
73. The Tribunal has also taken into consideration independent country research. The Tribunal accepts that the Local Church membership is officially banned in China and considered an "evil cult". However the Tribunal has also taken into consideration the many millions of home churches found across China and notes the independent research which confirms gatherings of 30 to 40 people are generally tolerated. Furthermore, although it states that members of unregistered church movements could be monitored by authorities, they do not refer to any such incidents occurring to members of the Local Church or other unregistered groups in Fujian province.
74. For the reasons outlined above, the Tribunal does not accept that the applicant is a Christian who attended the Local Family church in China for ten years as he claims. The Tribunal finds that these claims are not credible.
75. The Tribunal has considered the applicant's claims that because of his attendance at church in China, his home was raided and religious material found and he was taken away and arrested, interrogated and detained for 15 days and then he had to attend the police station every Sunday for re-education and brainwashing and he was forbidden to attend church again. Given the Tribunal does not accept that the applicant's claims regarding his church attendance and finds they are not are credible, for the same reasons the Tribunal does not accept that the applicant was arrested by police and was subject to the treatment detailed above.

76. The Tribunal has considered the evidence before it that the applicant arrived in Australia with fraudulent travel documents. The applicant confirmed at hearing the documents were fraudulent. He also claimed that he had to obtain fraudulent documents because he would not have obtained a visa as a student because of his age. The Tribunal has no reasons not to accept these claims given the Department's advice and the applicant's admission is consistent, however, the use of fraudulent travel documents is deceptive and adds to the reasons for the Tribunal making a finding against the applicant's claims on credibility grounds.
77. The applicant has provided evidence of his attendance at the Church in Melbourne and a photograph of him being baptised, he claimed he use to attend church in [Suburb 2] and [Suburb 3] every week to two weeks but he does not attend any more. He claims he doesn't attend for family reasons and also because of depression. The Tribunal has also considered that the applicant responded when asked about why he doesn't attend anymore by stating it "doesn't feel right". The Tribunal accepts that the applicant had some contact with the church in Melbourne and may have been baptised. However given his limited involvement in the Church in Melbourne his limited knowledge of Christianity in general and his confirmed nonattendance at church now, coupled with the credibility findings against him and the fact that he has confirmed that if he were to return to China he is not sure if he would attend a Local Family Church, the Tribunal does not accept that applicant attended Church in Melbourne for any reason other than to enhance his migration claims and does not accept that on return to China he would actively practice Christianity.
78. The Tribunal asked the applicant about his claimed depression. The applicant stated that he and his wife have been separated for a long time. Two weeks prior to the hearing she filed for divorce. He also claims he is confused and finds it hard to be clear. The Tribunal asked the applicant if he had seen a doctor or if his medical condition had been diagnosed. He stated no and confirmed he was not on medication. The Tribunal also noted that the applicant demonstrated no difficulty in understanding the questions put to him or answering them in a coherent manner. There was nothing to suggest in the applicant's demeanour or answers that his ability to engage in the hearing process was diminished. The Tribunal accepts that the applicant would be feeling extremely upset if his wife had filed for divorce, however, the applicant was able to engage in the hearing process and answer all questions put to him in a clear manner. The Tribunal acknowledges that it would be reasonable for the applicant to feel anxious and stressed because of a divorce and his migration status; however this did not detract for his ability to understand and engage with the hearing process based on the detailed answers he was able to provide that were in context with the questions asked.
79. The Tribunal has considered the applicant's claims that his wife is an adherent to the Local Family Church and has been arrested and detained. The Tribunal put to the applicant the opportunity to explain how his wife has remained safe in China if as he has stated she has been profiled as a member of an unregistered church. The applicant could not explain why she has been able to remain safe following her claimed arrest. Given the credibility findings against the applicant, confirmation by the applicant that he and his wife are separated and she has filed for divorce and in consideration of country information, the Tribunal finds that the applicant would not be targeted by Chinese officials based on his wife's or ex-wife's profile as an adherent to the Local family Church.
80. The Tribunal has considered the applicant's return to China based on the fact that he has departed on fraudulent travel documents. The Tribunal put to the applicant that he would be likely to face a fine and possible detention. The applicant acknowledged this and stated that he understood that it was illegal. The Tribunal finds that should the applicant be fined or incarcerated for a period of time due to his use of fraudulent travel documents, the Tribunal has had regard to the *General application of the law*.

81. It is well established that enforcement of a generally applicable law does not ordinarily constitute persecution for the purposes of the Convention,¹ for the reason that enforcement of such a law does not ordinarily constitute discrimination.² As Brennan CJ stated in *Applicant A*:
82. “the feared persecution must be discriminatory. ... [It] must be “for reasons of” one of [the prescribed] categories. This qualification ... excludes persecution which is no more than punishment of a non-discriminatory kind for contravention of a criminal law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of “refugee”.³
83. The principle that, ordinarily, non-discriminatory application of generally applicable laws does not constitute persecution applies whether or not a particular law is oppressive or repugnant to the values of our society.⁴ In *Applicant A* Dawson J agreed with the observations of the Full Federal Court in that case that:
84. Since a person must establish well-founded fear of persecution for certain specified reasons in order to be a refugee within the meaning of the Convention, it follows that not all persons at risk of persecution are refugees. And that must be so even if the persecution is harsh and totally repugnant to the fundamental values of our society and the international community. For example, a country might have laws of general application which punish severely, perhaps even with the death penalty, conduct which would not be criminal at all in Australia. The enforcement of such laws would doubtless be persecution, but without more it would not be persecution for one of the reasons stated in the Convention.⁵
85. While the implementation of laws of general application does not ordinarily constitute persecution, there is no rule that the implementation of such laws can *never* amount to persecution. A law of general application is capable of being implemented or enforced in a discriminatory manner.⁶ Where laws of general application are selectively enforced, in that the motivation for prosecution or punishment for an ordinary offence can be found in a Convention ground, or the punishment is unduly harsh for a Convention reason, then Convention protection may be attracted.
86. There is no evidence before the Tribunal that Chinese laws as they are administered in Fujian province are applied in a way that is discriminatory or selectively enforced against a returnee. The Tribunal is not satisfied that application of these laws to the applicant would involve systematic or discriminatory conduct as required under s.91R(1)(c) of the Act.
87. The Tribunal has considered that the applicant may face punishment from the Chinese authorities because of the use of fraudulent documents. In regards to complementary protection criterion, the Tribunal finds the applicant faces the same risk as that faced by the rest of the population in the same circumstances and as such it is not taken to be a real risk in reference to s36(2B)(c). *SZSPT v MIBP (2014) FCA 1245*, the Federal Court held that while every citizen who broke the law of general application would necessarily face a risk of punishment, s36(2B)(c) applied because it was no different from the risk faced by the population generally is faced by the population generally.

¹ *Applicant A v MIEA* (1997) 190 CLR 225 per McHugh J at 258 referring to *Yang v Carroll* (1994) 852 F Supp 460 at 467

² *Chen Shi Hai v MIMA* (2000) 201 CLR 293, at [20]

³ *Applicant A v MIEA* (1997) 190 CLR 225, at 233.

⁴ See eg, *Zheng Jia Cai v MIMA* (unreported, Federal Court of Australia, French J, 13 June 1997) at 16; *Lama v MIMA* (1999) 57 ALD 613 at [30], upheld on appeal in *Lama v MIMA* [1999] FCA 1620 (Branson, Sackville and Kiefel JJ, 19 November 1999); and *Alamdar v MIMA* [2001] FCA 1244 (Emmett J, 30 July 2001).

⁵ *Applicant A v MIEA* (1997) 190 CLR 225, at 245 citing with apparent approval *MIEA v Respondent A and B* (1995) 57 FCR 309 at 319.

⁶ *Ibid* at [21], *Applicant S v MIMA* (2004) 217 CLR 387 at [42].

88. The Tribunal has considered how the applicant will be treated as a 'returned asylum seeker' Given the protection process has been confidential, the Tribunal can see no reason why the Chinese Government would know about his claims for protection. In any event, a country information report on the treatment of returned failed asylum seekers to China⁷ provides:

.... the treatment would differ depending on local authorities' previous knowledge of the individual, the point of entry and whether the Bureau of Exit and Entry Administration had maintained a flag against the individual's name. If Chinese authorities believed a returnee was a Falun Gong practitioner or a political dissident the individual would likely be interviewed, kept under surveillance and/or detained. However, if Chinese authorities believed a returnee was a member of an unregistered church, it is assessed the individual would receive less severe treatment.

89. Given the Tribunal's findings about the applicant's limited level of church activity in Australia, it is satisfied the Chinese authorities would have no cause to believe the applicant is a returning, active member of an unregistered church. The Tribunal finds that there is not a real chance or real risk that the applicant will be harmed on return to China due to him being a returned asylum seeker.
90. The Tribunal has considered the applicant's claims regarding his membership of the Local Family Church, his limited knowledge about Christianity and the lack of detail he was able to provide regarding his experiences with the Local Family Church in China and also his experience with Church in Melbourne and finds that the applicant is not a credible witness. As such the Tribunal does not accept the applicant's claims as detailed above. The Tribunal finds that the applicant does not face a real chance or real risk of harm for any reason convention or non-convention related.
91. The Tribunal is not satisfied that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to China that he faces a real chance of serious harm or a real risk of significant harm if he returns to China now or in the reasonably foreseeable future.

CONCLUDING PARAGRAPHS

92. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
93. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
94. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

95. The Tribunal affirms the decision not to grant the applicant a Protection visa.

⁷ CXBD6A0DE6523: "China – Country Information Request C1150402160444876 – Treatment of Returned Failed Asylum Seekers, DFAT, 18 May 2015

Signed by AustLII

Rachel Westaway
Member

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